

Court of Appeals, State of Michigan

ORDER

Paul Mission v Estate of John Corbett

Docket No. 294905

LC No. 08-105140-NO

Kathleen Jansen
Presiding Judge

Donald S. Owens

Douglas B. Shapiro
Judges

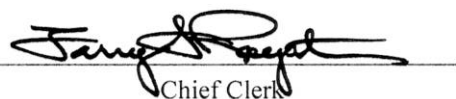
The Court orders that the February 8, 2011 opinions are hereby VACATED, and a new opinion and concurring opinion are attached.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

FEB 17 2011

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PAUL MISSON,

Plaintiff-Appellant,

v

JULIE CORBETT, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
JOHN CORBETT,

Defendant-Appellee,

and

JULIE CORBETT,

Defendant-Appellee.

UNPUBLISHED
February 17, 2011

No. 294905
Wayne Circuit Court
LC No. 08-105140-NO

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this premises liability matter, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition and dismissing plaintiff's cause of action in negligence. We affirm.

Plaintiff, a subcontractor contracted to clean the gutters on defendants' home, suffered serious injuries when he fell from defendants' two to three story low to medium pitch roof after encountering a swarm of bees. Plaintiff was aware that bees might be present on the roof before he started the job because defendant warned him that she had observed bees on the premises and provided him with bee spray. Plaintiff, contrary to the contractor's instructions, proceeded to go onto defendants' roof to clean out the gutters without the use of a harness and lanyard or "roping off" to protect him in the event of a fall. Plaintiff felt the available harness was unsafe, and his coworker indicated that plaintiff, whom he characterized as stubborn, felt comfortable and confident that he did not need to "rope off." For the next three to four hours, plaintiff worked on the roof cleaning the gutters without issue. During this time, although he observed a "few bees" and hives, they did not bother him. When there was only a small area left to clean, plaintiff discovered a beehive in the gutter and on the outside edge of the house with bees "flying up under the roof." He proceeded to spray the hive with bee spray and "knock off" "a small cone where the beehive started" with a long broom handle, after which he observed a "cloud" or

“swarm” of bees come from between the gutter and the roof boards. He then walked up to the peak of the roof where he encountered the swarm of bees. While backing up, he attempted to spray the bees and fell off the roof “roughly twenty-five to thirty feet” to the ground. Although plaintiff did not know what specifically caused him to fall, there was “no question in his mind” that he would not have fallen but for the presence of the swarm of bees on the roof. Unfortunately, he suffered serious injuries as a result of the fall.

Plaintiff filed the instant suit in negligence against defendants alleging that they breached their duty to warn him of the existence of a beehive on the roof and to remove the hive before he began working on the roof. Plaintiff alleged that defendants’ breach of duty was the direct and proximate cause of his injuries. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff’s claim was barred under MCL 600.2959 because plaintiff’s conduct in failing to take safety precautions to protect himself and deliberately disturbing the hive rendered him more than 50 percent comparatively negligent, thereby precluding recovery for noneconomic damages. Defendants also argued that plaintiff’s claim was barred by the open and obvious doctrine because the danger posed by the height of the roof and the presence of bees were open and obvious dangers associated with working on a roof lacking any “special aspects” that made it unreasonably dangerous. The trial court granted defendants’ summary disposition motion on both bases.

We review a trial court’s decision on a motion for summary disposition *de novo*. *Perkoviq v Delcor Homes – Lake Shore Pointe, Ltd*, 466 Mich 11, 15; 643 NW2d 212 (2002), citing *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Maiden*, 461 at Mich 120. “In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Id.* “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Id.*

Plaintiff first claims that the trial court misapplied the open and obvious doctrine to preclude his negligence claim. We disagree.

The owner or possessor of land owes a duty to an invitee “to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land’ that the landowner knows or should know the invitees will not discover, realize, or protect themselves against.” *Perkoviq*, 466 Mich at 16, quoting *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). “Where a condition is open and obvious, the scope of the possessor’s duty may be limited.” *Perkoviq*, 466 Mich at 16, quoting *Bertrand*, 449 Mich at 610. “While there may be no obligation to warn of a fully obvious condition, the possessor still may have a duty to protect an invitee against foreseeably dangerous conditions.” *Perkoviq*, 466 Mich at 16-17, quoting *Bertrand*, 449 Mich at 610-611. “[T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable

precautions.” *Perkoviq*, 466 Mich at 17, quoting *Bertrand*, 449 Mich at 611 (emphasis in original). That is, “a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk.” *Perkoviq*, 466 Mich at 18, quoting *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 517; 629 NW2d 384 (2001). A condition has “special aspects” rendering it unreasonably dangerous where it is “effectively unavoidable” or where it presents “a substantial risk of death or severe injury” to an invitee who encounters the dangerous condition. *Lugo*, 464 Mich at 518. “[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.” *Lugo*, 464 Mich at 519. If such special aspects do not exist, the open and obvious condition is not unreasonably dangerous. *Id.*

The hazards that led to plaintiff’s injuries were the height of the roof and the swarm of bees he encountered while working on the roof, which caused him to fall. We find no question of fact that the height of the roof and the presence of bees and hives on the roof were “open and obvious” dangers associated with working on defendants’ roof. Clearly, the average person with ordinary intelligence would realize that there was a danger of falling and sustaining serious injury when performing work on a two to three story roof. Further, where the homeowner warned plaintiff about the presence of bees on the premises and plaintiff observed bees and hives while on the roof, it is evident that he knew that there were bees in the area, making the danger posed by the presence of bees open and obvious.

We also find no factual dispute that the roof lacked any special aspects that made the open and obvious risk posed by its height and the presence of bees unreasonably dangerous. The danger posed by the height of the roof and the presence of bees did not create a “uniquely high likelihood of harm or severity of harm” nor was it “effectively unavoidable.” *Lugo*, 464 Mich at 518-519. To the contrary, the risk of harm could have been minimized or eliminated had plaintiff utilized safety precautions to protect himself in the event of a fall or simply stopped working on the roof after discovering the hive and notified defendants so that they could take steps to remove it. Instead, he attempted to eradicate it himself, which apparently caused the bees to swarm and led to his fall from the roof. On these facts, the presence of the bees on the roof created a dangerous condition only because plaintiff apparently did not realize the obvious danger of deliberately disturbing the beehive while on top of a two to three story roof without safety precautions in place. Under such circumstances, we fail to find that special aspects existed rendering the open and obvious danger unreasonably dangerous. Accordingly, defendants did not have a duty “to undertake reasonable precautions to protect” plaintiff from the risk posed by the height of and the presence of bees the roof. *Perkoviq*, 466 Mich at 18; *Lugo*, 464 Mich at 516-517. Defendants, as owners and occupiers of the premises, could not have “reasonably foreseen” that plaintiff, as a subcontractor hired to clean the gutters of their house, would attempt to eradicate a beehive by spraying it and “knocking it off” with a broom handle while on top of a two to three story roof without appropriate safety precautions in place to protect him from the obvious danger posed by the height of the roof. We find summary disposition of plaintiff’s cause of action in negligence to be proper.

Plaintiff next claims that the trial court erred in concluding that he was more than 50 percent comparatively negligent, thereby precluding recovery of damages for his personal

injuries as a matter of law. Having found that plaintiff's negligence claim was precluded by the open and obvious doctrine, we need not address whether his claim was also precluded by Michigan's comparative negligence law. However, because the issue was raised before and addressed by the trial court, we will consider it.

“[T]he doctrine of pure comparative negligence distributes responsibility according to the proportionate fault of the parties. It requires that a plaintiff's damages be reduced in the same proportion by which the plaintiff's own conduct contributed to his or her injuries.” *Laier v Kitchen*, 266 Mich App 482, 496; 702 NW2d 199 (2005), citing MCL 600.2959; *Placek v Sterling Heights*, 405 Mich 638, 660-661, 681; 275 NW2d 511 (1979). Under MCL 600.2959, where the plaintiff's fault exceeds 50 percent, he cannot recover noneconomic damages.¹ “The standards for determining the comparative negligence of a plaintiff are the same as those of a defendant—the jury must consider the nature of the conduct and its causal relationship to the damages—and the question is one for the jury unless all reasonable minds could not differ or because of some ascertainable public policy consideration.” *Laier*, 266 Mich App at 496. Causation in a negligence action requires proof of both cause in fact and proximate cause. *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). Proximate cause involves an examination of the foreseeability of consequences and a determination whether a defendant should be held legally responsible for those consequences. *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475(1994).

Considering the nature of the conduct and its causal relationship to plaintiff's injuries, we find no error in the trial court's conclusion that plaintiff was greater than 50 percent comparatively negligent as a matter of law. Here, there was no genuine issue of material fact that plaintiff failed to use a safety harness or rope, despite instructions to do so, and deliberately disturbed a beehive by spraying it with bee spray and knocking it with a broom handle while on top of a two to three story roof with the knowledge that bees were present. The subsequent bee swarm caused his eventual fall. On these facts, reasonable minds could not differ that plaintiff's negligent conduct was the cause in fact as well as the proximate cause of his injuries. There was minimal, if any, evidence tending to indicate that defendants' conduct contributed to plaintiff's

¹ Specifically, MCL 600.2959 provides:

In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. If that person's percentage of fault is greater than the aggregate fault of the other person or persons, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, and noneconomic damages shall not be awarded.

injuries. To the contrary, defendants warned plaintiff of the presence of bees on the premises, and it was not reasonably foreseeable that a subcontractor would work on the two to three story roof without taking safety precautions. On such facts, we find, as a matter of law, that plaintiff's fault in deliberately disturbing the hive and failing to take safety precautions to protect himself in the event of a fall exceeded defendant's fault, if any. Accordingly, under MCL 600.2959, plaintiff was precluded from recovering noneconomic damages for his personal injuries, making summary disposition of his action in negligence proper.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens